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IN THE

Supreme Court of the United States

October Term, 1960.

No. 859.

COMPANIA NACIONAL DE
NAVEGACAO CASTEIRO PATRIMONIO,

Petitioner,

v.

THE CABINS TANKER INDUSTRIES, INC., Owner of the Steamship "THE CABINS" and TERMINAL TANKER INDUSTRIES, INC., bareboat charterer, as its interest may appear,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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COMPANIA NACIONAL DE NAVEGACAO CASTEIRO PATRIMONIO,

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THE CABINS TANKER INDUSTRIES, INC., OWNER OF THE STEAMSHIP "THE CABINS" AND TERMINAL TANKER INDUSTRIES, INC., BAREBOAT CHARTERER, AS ITS INTEREST MAY APPEAR,

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OPINIONS BELOW.

The citations to the opinions of the courts below are set forth in the petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

1. Where one vessel in a maritime collision was admittedly at fault and her errors of navigation contributing to the collision were serious, and there is no clear and convincing evidence of contributory negligence by the other vessel, is it not immaterial whether the court characterizes such lack of proof as not being "beyond a reasonable doubt" or as insufficient to prevent "resolving any reasonable doubt" in favor of such other vessel?

2. Since an appeal in admiralty litigation constitutes a trial *de novo*, is it not proper for the court below to modify, alter or amend a clearly erroneous finding of the trial court, particularly where such revision further supports the conclusion of the trial court as to ultimate liability?

STATEMENT OF THE CASE.

While respondents do not concur with the entire statement set forth by petitioner, the issues posed can be answered by reliance on the opinions below, without detailing a counter-statement.

ARGUMENT.

I. An Erroneous Rule of Evidence Was Not Established by the Court Below With Respect to Burden of Proof in Maritime Collisions.

The court below did not establish an erroneous rule of evidence with respect to the burden of proof in maritime collisions. The court merely reiterated a longstanding principle in slightly different language which nevertheless calls for an identical degree of proof. In other words, both the court below and Mr. Justice Brown in *The City of New York*, 148 U. S. 72, 85 (1893), used the term "reasonable doubt" as their point of reference when considering a case where the faults of one vessel were sufficient in themselves to account for the disaster. It is not enough for such vessel to raise a doubt with regard to the management of the other vessel, since any reasonable doubt will be resolved in favor of the latter. Therefore, as the court below has stated, the proof of fault required must be "beyond a reasonable doubt" to make out a case for apportionment. What the court below has said must necessarily be construed as calling for a conclusion identical in result to that set forth by Mr. Justice Brown. A multitude of cases have cited this principle with approval including *The Oregon*, 158 U. S. 186, 204 (1895) and *The Victory*, 168 U. S. 410, 423 (1897).

The cases cited by the petitioner in support of its argument that issues of fact in civil litigation are determined in accordance with the preponderance of evidence cannot be likened to the present case. *New York Life Insurance Company v. Gamer*, 303 U. S. 161 (1938); *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308 (1902), and *Williams v. Conger*, 127 U. S. 397 (1888). All three cases were civil jury trials wherein the issues raised on appeal in part involved the trial court's charge to the jury.

In maritime litigation the terms "reasonable doubt" and "preponderance of evidence" are not used to determine the "Measure of Jury's Persuasion" as these phrases are

discussed in *Wigmore on Evidence*, 3rd Ed., Vol. 9, §§ 2497, 2498 (1940). Nevertheless, that the degree of proof required is similar to that called for in a criminal case is best borne out by petitioner's citation to *Holt v. United States*, 218 U. S. 245, 253 (1910). Therein the trial judge's charge to the jury regarding reasonable doubt in a criminal case was reviewed and approved. The lower court's charge on reasonable doubt stated in part that ". . . the evidence must be *clear and convincing* and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty." (Italics ours.) Is it not significant that Mr. Justice Brown in the *City of New York, supra*, prefaced the statement regarding reasonable doubt with similar language?

> "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be *clear and convincing.*" (Italics ours.)

The term "clear and convincing" was also used by Chief Justice Fuller in *The Victory, supra*, and it has been used in a multitude of cases since the above decisions.

Finally, even if it is possible to say that the lower court's phrase regarding reasonable doubt was in error, the citations in support of the statement, namely, *The City of New York, supra*, and *Whitestock Towing Corp. v. Bethlehem Steel Co.*, 279 F. 2d 419 (4 Cir., 1960), surely clarify the manner in which it was intended to be used. Further, the admiralty opinions make it clear that there is a burden on one clearly at fault to cast more than a suspicion of fault on the other vessel. Mr. Justice Brown in *The City of New York, supra*, described this as, ". . . some presumption at least adverse to its claim . . .". If the proffered testimony is not sufficient to rebut such a presumption, it is a voyage into semantics to concern ourselves as to whether the court below would have reached a different conclusion

if its rationale had been based upon "a preponderance of the evidence" rather than reciting the requirement of proof "beyond reasonable doubt." For these reasons, the petitioner's argument that a new rule of evidence has been established is without merit.

II. In View of the Findings Made by the Courts Below, the Stated Issues Relating to the Obligation of a Vessel to Maintain a Careful Lookout and Keep Out of the Way of a Drifting Vessel Are Irrelevant.

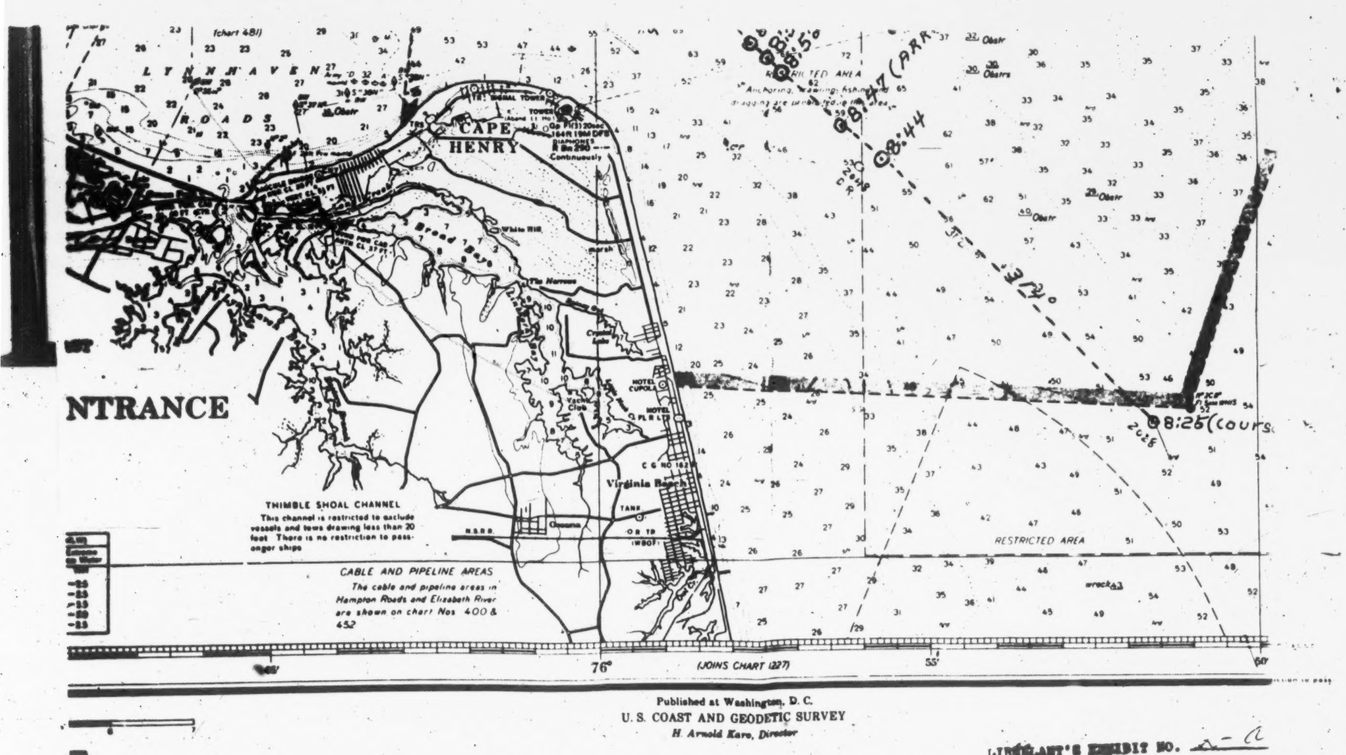
There can be no dispute that a moving vessel must maintain a careful lookout and keep out of the way of a drifting vessel. These are basic principles, but they cannot in any event be applied to the facts as found by the trial judge and affirmed by the court below. We are not here dealing with a case involving the failure of one vessel to become timely aware of the presence of another. The Rio was seen by those in charge of the navigation of The Cabins at a distance of three miles (R. 20a). We are not dealing with a case of a vessel heedlessly ignoring the obvious helplessness of a drifting vessel and needlessly shaping her course too close. Our facts involve two vessels, each amply alerted to the presence of the other, in an area where it is normal for vessels to pass within two shiplengths with a complete failure by the Rio to indicate that

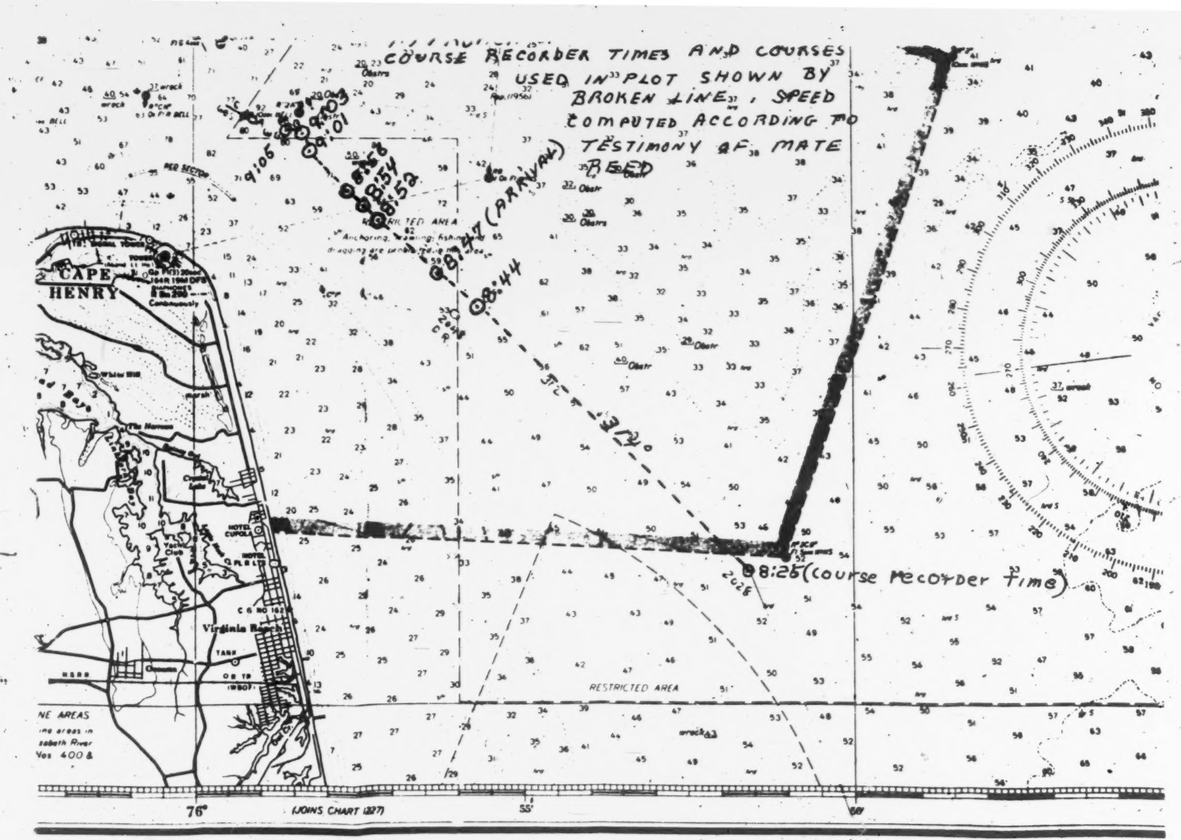
(a) those in charge of her had suddenly become aware that she was anchored in an improper location,

(b) she was without motive power,

(c) but would nonetheless raise anchor and permit herself to be carried, by wind and tide, across the path of an approaching vessel.

Not only did the Rio fail to make use of several means available to warn the Cabins of the impending danger (R. 42a), she also displayed improper lights which could not possibly communicate her "out of command" and


CAPE HENRY
Virginia Beach
RESTRICTED AREA
THIMBLE SHOAL CHANNEL
This channel is restricted to exclude vessels and tows drawing less than 20 feet. There is no restriction to passenger ships
CABLE AND PIPELINE AREAS
The cable and pipeline areas in Hampton Roads and Elizabeth River are shown on chart Nos. 400 & 452
76°
(JOINS CHART 1227)
Published at Washington, D. C.
U. S. COAST AND GEODETIC SURVEY
H. Arnold Karo, Director
LIBELANT'S EXHIBIT NO. A-A


COURSE RECORDER TIMES AND COURSES USED IN PLOT SHOWN BY BROKEN LINE, SPEED COMPUTED ACCORDING TO TESTIMONY OF MATE REED
CAPE HENRY
Virginia Beach
RESTRICTED AREA
8:25 (course recorder time)
76°
(JOINS CHART 1227)
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"drifting" condition to the CABINS (R. 46a, 47a). On the contrary, the lights displayed indicated ". . . the RIO was under full command" (R. 50a). Nowhere is there a finding that one red light, whenever it was seen by the CABINS, meant or could reasonably be understood to mean the RIO was "out of command" (R. 47a). There is no finding that the CABINS was unaware of the RIO's presence, but there are findings and evidence indicating that the CABINS had no reason to be aware of the danger or the RIO's status until just prior to the collision (R. 52a). From this background the RIO urges that her intentions and maneuvers should have been divined because they were so timed to be of maximum embarrassment to the CABINS' approach as she slowed down in the area of a pilot station, an area where it has been found not unusual for vessels to pass within two shiplengths of each other (R. 49a).

One last point to simply clarify the weakness of the premise upon which petitioner builds its arguments on this issue relates to the RIO's direction of drift. The RIO has urged that there was *no evidence* to support the finding of the trial judge that the RIO drifted ". . . directly toward the path of the CABINS," despite testimony of the RIO's pilot, with some 40 years' experience, that the drift was "To the northward, north-northwest" (R. 38a). This must necessarily have taken her across the 315° or northwesterly course being steered by the CABINS prior to the collision.

Legal principles, no matter how well established, cannot be applied without operative facts; therefore, the RIO, having ignored and completely failed its duty to warn the approaching CABINS, has no foundation from which to advance its contentions and they must fail.

III. It Is Proper for the Court Below to Modify or Amend a Finding of the Trial Court, Particularly When the Modification Is Supported by the Evidence.

It is an established principle that an appeal in admiralty litigation constitutes a trial *de novo*, and a review-

ing court may set aside findings of the trial judge which are deemed to be "clearly erroneous," *McAllister v. United States*, 348 U. S. 19 (1954). Research has not revealed any authority which prevents a reviewing tribunal from properly modifying or altering a finding of the trial judge, and certainly the foregoing principle should hold true when the modification is not only supported by evidence but does not change or alter the end result with respect to liability.

Petitioner bases Point III of its argument on the fact that the trial court found that the anchor of the Rio was aweigh at 2055 or 2056, and she swung from south to north within 2 or 3 minutes, resulting in an interval of 7 or 8 minutes until the collision occurred, whereas the court below amended this finding, by implication, reducing the interval by the finding that the vessels were then only two shiplengths apart.

We need only refer to the opinion of the trial court to realize how uncertain Judge Hoffman was with respect to his finding of the time the Rio raised her anchor (R. 43a):

> "As the Rio made no notation of times, other than when the pilot boarded the vessel at 2040 and the engines again commenced to function at 2143, it is difficult to fix the pertinent times as related to her activities. Certainly it cannot be seriously urged that the anchor was aweigh at 2043 as testified to by the master, chief mate, and others. It is a fair assumption that, with the language barrier existing, a few minutes were spent in conversation and, according to the pilot and second mate, it was a matter of 8 or 9 minutes after she commenced heaving before the anchor was aweigh. An appropriate estimate of the time when the anchor was aweigh is 2055 or 2056."

The court below obviously concluded that the finding was erroneous, accepted the definite testimony of those in charge of The Cabins, and accordingly impliedly modified the finding as to the time when the anchor of the Rio was

aweigh by specific reference to the swing of the Rio being noted by The Cabins as the latter vessel drew within two shiplengths.

This conclusion is supported by testimony of the master and chief officer [1] of The Cabins. It therefore seems apparent that the court below appropriately modified the finding of the trial judge and petitioner is without a foundation upon which to base its complaint.

CONCLUSION.

The issues which the petitioner attempts to pose cannot be supported by law or fact; respondents therefore respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

Samuel F. Fortenbaugh, Jr.,
James F. Young,
Leon T. Seawell,
Proctors for Respondents.

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1. Partial Transcript of Testimony at Trial.

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William B. Smith, Captain

Q. At that time, 2105, would you describe the position of the Rio Maracana and the lights you saw.

A. At that time, she had swung around and was showing a green running light, heading directly towards me. At the same time, I sighted his green side light, I saw a red light above his bridge house.

* * *

Q. What was his distance away (at 2105)?

A. About two ship lengths.

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Charles A. Reed, Chief Officer

Q. What was the vessel doing at this time? The other vessel which you have designated as the Rio Maracana.

A. At that time, at 2105, the approaching vessel had altered course again to show that she was coming directly toward us, with just the starboard or green side light showing.